

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE**

**IN RE**

<b>JAMES MAULKMUS McMILLAN</b>	)	<b>Case No.: 09-30986</b>
<b>f/d/b/a J. McMILLAN &amp; COMPANY and</b>	)	<b>Chapter 7</b>
<b>CAROL ANN McMILLAN</b>	)	
<b>Debtors.</b>	)	
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<b>BUFFALO CONSTRUCTION, INC.</b>	)	
<b>Plaintiff,</b>	)	
<b>vs.</b>	)	<b>Adv. Proc. No. 09-3073</b>
<b>JAMES MAULKMUS McMILLAN</b>	)	
<b>f/d/b/a J. McMILLAN &amp; COMPANY and</b>	)	
<b>CAROL ANN McMILLAN</b>	)	
<b>Defendants.</b>	)	

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**MOTION TO DISMISS**

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Come now the Defendants and for their Motion to Dismiss the First Amended Complaint in this case would show unto the court as follows:

1. That the Plaintiff filed the original Complaint on or about June 2, 2009 and subsequently Amended the Complaint on June 3, 2009. On or about June 3, 2009 a Summons was originally issued in this case.
2. The Plaintiff failed to properly serve the Defendants pursuant to Bankruptcy Rule 7004(m) incorporating the Federal Rules of Procedure Rule 4(m).
3. An Alias Summons that was served on the Defendants and Counsel or about November 4, 2009 with an attached copy of the first Amended Complaint.
4. Pursuant to the Rule of Civil Procedure as stated above, Bankruptcy Rule 7004(m), the service of a Complaint more than 120 days after filing is ineffective to properly serve the Defendants in the case as the rule requires service be

completed within 120 days of filing the Complaint.

5. The Defendants would show that no cause exists with respect to an extension nor was an extension of time requested by the Plaintiffs and therefore the Complaint should be dismissed for failure to execute service on the Defendants as required by the Rules of Procedure, Bankruptcy Rule 7004(m). Alternately, the service of the Alias Summons and the first Amended Complaint is ineffective and does not constitute service on the Defendants in this case because of the failure to comply with the Rules and, as a result thereof, the Court should dismiss the Amended Complaint on the Defendant's motion.
6. The Defendants have filed with this Motion a Brief in support of their Motion to Dismiss.

**WHEREFORE**, the Defendants pray that the Court enter an Order dismissing this Adversary Proceeding and for such other and further relief to which they may be entitled.

Dated this 3<sup>rd</sup> day of December, 2009.

/s/ John P. Newton, 010817  
/s/ Richard M. Mayer, #5534  
Law Offices of MAYER & NEWTON  
Attorneys for Defendants  
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(865) 588-5111

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **Motion to Dismiss** has been served either electronically (ECF) or by placing in the United States First Class Mail (USM) with sufficient postage to insure delivery:

D. Scott Hurley  
Attorney for Plaintiff  
P. O. Box 682  
Knoxville, TN 37901

Dated: December 3<sup>rd</sup>, 2009.

/s/ Richard M. Mayer, #5534  
/s/ John P. Newton, Jr., 010817  
Law Office of MAYER & NEWTON  
Attorneys for Defendants